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# the ADR newsletter

## Corps Members Recognized for Outstanding ADR Efforts



From left to right: William Coleman, John Hall, Larry Evans, and Lester Edelman



Frank Jordan

Several Corps members were recognized this year for their outstanding contributions to the Corps of Engineers' mission through the practice of Alternative Dispute Resolution.

In May, 1996, at the Division Counsel Conference in Monterey, CA, the Corps' Chief Counsel, Lester Edelman, presented the "E. Manning Seltzer Award" to Frank Jordan, Charleston District Counsel, for his successful use of ADR to resolve a complex contract dispute with a South Carolina state agency. The award is given annually to Corps attorneys for their special contribution to the Corps legal services mission.

Mr. Edelman also presented the "Special Award for Dispute Avoidance and Resolution" to Jacksonville District Team members John Hall, Chief of the Regulatory Branch, and Larry Evans, Chief of the Enforcement Section. This award recognizes an individual for his or her practice of preventive law and the avoidance and resolution of disputes. These Corps members were recognized for their exceptional efforts in developing an ADR program to resolve regulatory enforcement cases that fall within the jurisdiction of the Jacksonville District.

## Destination Internet

*"You can never plan the future by the past."*

—Edmund Burke, British statesman and political writer

The Corps plans to move the ADR newsletter from paper to cyberspace. We think this makes good business sense by eliminating printing and mailing costs, while still enabling us to provide succinct,

quality information and advice to support the Corps in its use of ADR. Beginning with the new fiscal year (October, 1996), the newsletter will be solely electronic.

Another idea? We might also run a chat room where people can discuss their ADR experiences and questions.

Look for us on the Internet at:

<http://www.wrc-ndc.usace.army.mil/iwr>.

## EDITORIAL STAFF

**Executive Editors:** Frank Carr, Chief Trial Attorney, Corps of Engineers  
Jerome Delli Priscoli, Senior Policy Analyst, Institute for Water Resources

**Senior Editor:** Donna Ayres, ADR Program Coordinator

# Huntington District Uses ADR to Resolve Contract Claims

In two 1995 cases, the Huntington District has successfully used ADR to resolve contract claims.

## Case #1

The first case involved Nicholson Construction Company. On August 19, 1992, a contract for remedial work on the dam at Delaware Lake in West Virginia was awarded to Nicholson by the Huntington District. The contract amount was \$876,800.

On December 16, 1993 and again on March 31, 1994, the company filed a claim for additional compensation of \$403,399.72. They alleged that the Corps wrongfully rejected the contractor's first two plans of operation for anchoring the concrete monoliths. The contractor claimed that its third plan of operation involved an anchoring technique "mandated" by the Corps, and that adoption of this third plan led the contractor to incur considerable additional costs.

On February 24, 1995, the appeal was filed with the Corps of Engineers Board of Contract Appeals, during which the opposing attorney asked that ADR be employed as a means to resolve the appeal. The Corps accepted this request.

On December 19, 1995, ADR proceedings were held in Washington, DC with Judge Richard Solibakke (retired), former chair of the Engineers' Board of Contract Appeals, serving as mediator. In contrast to the contractor's claim, the District Contracting Officer thought that the first two plans of operation proposed by the contractor (and rejected by the Corps) were actually more costly than the approach finally taken by the contractor, so that the contractor could not have incurred additional costs because the first two anchoring proposals were rejected.

At the end of the day, the judge determined that the specifications for the anchoring work were, indeed, ambiguous and recommended that the Corps make a settlement offer between \$200,000 and \$300,000. The judge's opinion came as a surprise to the Corps. They were aware that there were some ambiguities in the specifications, but not to the extent found by Judge Solibakke.

The ADR session concluded with the parties still far apart—the Government's best offer was \$80,000 and the contractor's offer was \$380,000. But they did agree to continue negotiations without the judge. The Contracting Officer and Willie Williams, the attorney for Huntington District, continued to negotiate with the contractor through the depositions of the Government witnesses, up to the day before depositions of the contractor's witnesses began. The case was settled on May 1 when Williams was on his way to Pittsburgh to take depositions. In fact, Williams showed up in Pittsburgh at the contractor's office on May 2, not knowing that the Contracting Officer and the company's principal had reached agreement over the phone the night before.

The amount of the settlement was \$235,000. The parties had agreed to

the \$235,000 settlement on April 30, but the agreement fell through on May 1 when the contractor's attorney maintained that CDA (Contract Dispute Act) interest was not included.

According to Williams, a number of factors influenced the outcome of this case. The ADR session did not result in a settlement that day because, frankly, people were still holding strongly to their positions. But the judge's opinion caused the Corps to re-examine its position.

"Judge Solibakke's opinion was highly respected," Williams said.

The Corps also had the opportunity to look at other information after the ADR was over, and to look at it in a new way because of the ADR. As Williams pointed out,

"The ADR process helped us to see the issue in a different light. Without ADR, and without Judge Solibakke's opinion, we would have litigated this issue, no doubt about it."

## Case #2

On September 12-14, 1995, the Huntington District used a mediation-type ADR to achieve a mutually acceptable resolution with GLR Constructors, a joint venture, on six appeals and two claims stemming from construction of the Robert C. Byrd Locks and Dam.

The appeals and claims totaled \$1,364,092. They ranged from allegations of impossibility of performance resulting from defective specifications to allegations of performance beyond contract requirements.

Huntington District Counsel and GLR attorneys negotiated a mediation agreement. It provided that, after a reasonable period of negotiations, if the mediator determined that the parties were so far apart that an agreement was unlikely within the time allotted for the proceeding, then, at the request of either party, he would render an oral summary opinion of the merits and amount of settlement jointly to both parties. Further, if the parties could not reach agreement within the allotted time, the mediator was to provide both parties a written opinion on the merits and amount of settlement within 14 days.

In negotiating the mediation agreement, the District insisted that GLR's principal have only limited prior involvement, so that he would not carry preconceived and hardened positions into the ADR proceeding. To support this position, the Huntington District Contracting Officer allowed his Division counterpart, the Deputy for Contracting in the Engineering and Technical Services Directorate for the Ohio River Division, to act as principal for the Corps. GLR's principal was the corporate president of Atkinson Construction.

The parties engaged in voluntary discovery. Then position papers for all eight appeals and claims were exchanged, and a joint list of issues was submitted to the mediator and two principals. Counsel for each party spent four hours in various presentations and two hours in rebuttal. This process ensured that each party appreciated the facts, strengths and weaknesses of the two sides' positions. Only after these presentations and rebuttal did negotiations actually begin, on the afternoon of the second day.

Negotiations concluded late on the third day, without the need for the mediator to render a written opinion. All eight claims were settled for \$400,000.

The flexibility provided by using principals with only limited prior involvement; and the mediation agreement's emphasis on attempting resolution in a cooperative and informal manner rather than with an adversarial, formal proceeding were both important factors in the successful resolution of this dispute.

## Corps Uses ADR to Resolve EEO Complaints

Three years ago, when the Baltimore District was selected by HQUSACE as a test site for the Corps of Engineers Early Resolution Program (CEERP), Patricia West already had 20 years of EEO experience. She knew by heart the Code of Federal Regulations on EEO complaints of discrimination and harassment, and she welcomed the opportunity to experiment with methods that could prove valuable in those EEO situations that required a more flexible and “human” approach than that afforded by the CFR. Equally important, West recognized CEERP as an opportunity to gain recognition for—and enlarge the use of—the techniques of conciliation, counseling and mediation that the Baltimore EEO staff had long been practicing. [See sidebar for definitions of these techniques.]

Since CEERP was introduced in the Corps, West has mediated four cases, two of which were resolved successfully, i.e., without having to proceed with a formal complaint.

“I think the basis for successful mediation has been the strong commitment to solving the issues that the parties brought with them to the mediation table,” said West.

On the other hand, West observed, “Sometimes employees feel that mediation is just another layer to move through instead of being a genuine effort to resolve the problem early in the EEO process. I think we need to focus attention on getting employees and managers to understand and trust these alternative procedures.”

To enhance the program, West suggests that refresher courses in ADR techniques be available to EEO staff. She also expressed concern over the requirement to officially document conciliation efforts that are informal.

“In the eyes of some employees, the requirement for official documentation contradicts the claim that the process is informal,” West observed.

Donna Cheever from Omaha District has had experience similar to that of Patricia West’s when it comes to integrating ADR methods into the EEO resolution process. As EEO Officer, Cheever recalled that Omaha District’s caseload over the last two and a half years involved 14 situations in which conciliation was used and 8 in which mediation was requested, out of a total of 27 cases. When asked how it was working, Cheever stated unequivocally that the “program is working excellently.”

A year and a half ago, Omaha District offered training on the new ADR-enhanced EEO procedures, and overall, the program was well received. Non-supervisory employees liked the options afforded by ADR, although they were sometimes skeptical about the effectiveness of those alternative methods. The response from managers and supervisors has been, “If it’ll help, we’ll try it.”

Cheever thinks that managers see ADR as a good business practice because it can cut costs. Costs, in fact, are extremely low compared with the \$46,000 USACE average for each formal EEO complaint. In Omaha’s experience, the average conciliation cost is \$216; the average cost for each counseling phase is \$925; and each mediation costs about \$6,500.00. This amount includes the travel, per diem and salary costs of the mediator.

### KEY ADR TERMS FROM THE CEERP (CORPS OF ENGINEERS EARLY RESOLUTION PROGRAM)

#### **Conciliation:**

*In a CEERP environment, conciliation is an initial effort by the EEO Officer to quickly resolve matters raised by an employee or job applicant. The process essentially involves facilitated problem solving—helping the complainant clarify needs and identify options for resolution. The use of conciliation is at the discretion of the EEO Officer.*

#### **Counseling:**

*If conciliation fails to resolve EEO complaints, the EEO Officer offers the complainant the services of a trained third party (outside the EEO channel). In a process similar to a negotiation, this counselor discusses the situation with the complainant and ensures that the complainant is informed of his or her rights and how to proceed with the complaint process. The counselor helps the complainant frame the issue in a concise manner, suitable for formal filing. The counselor also informs management of the nature of the allegation, and tries to resolve the problem with the complainant.*

#### **Mediation:**

*Should counseling fail, mediation is an option. Mediation is the use of a neutral third party to help the employee and management reach a mutually agreeable resolution. Once the employee agrees to mediation, the EEO Officer selects a professionally trained mediator (e.g., someone from an EEO Office, Human Resources Office, or Office of Counsel). Generally, the mediator is brought in from outside the district or division and uses a structured process to probe the underlying issues of the complaint. The mediator uses questioning and active listening techniques designed to lead the complainant to discuss the situation fully. Usually, resolution is reached in 1-2 days. Mediators cannot impose a resolution on the parties, and they guard the confidentiality of the mediation. If resolution is not reached, the employee has the right to file a formal complaint.*

Asked for suggestions on how she might improve upon an already good program, Cheever offered the following:

- Reduce report requirements.
- Provide greater flexibility with respect to how long conciliation can be used. Currently, only three days are allowed for conciliation, which is insufficient considering that calendar and non-work days are counted.
- Provide refresher training for mediators, and cross-train EEO and Human Resource mediators. Without cross-training, the two Corps functions may be unable to use each other’s mediators, which Cheever noted “are in short supply.”

## RESOURCES

### ADR on the 'Net

There are many ADR resources available on the Internet. For a quick tour, we suggest you try searching the 'Net using one of the many Internet search engines such as "Alta Vista" or "Yahoo." It may take some time to find the gems, but it will be time well spent. Here are a few sites we thought were promising:

- <http://www.law.emory.edu/FOCAL/adr.html>  
This is a list of alternative dispute resolution links.
- <http://www.hq.nasa.gov/office/procurement/adrt94.html>  
This provides information about Vice President Gore's support of ADR in his program to reinvent government, The National Performance Review.
- <http://www.acq-ref.navy.mil/wcp/adr.html>  
This is the contact page for the Navy Acquisition Reform Office and their ADR files.
- <http://www.ca.cch.com/catalogue/legal/adr.html>  
Ever wonder what our Canadian neighbors are doing with ADR? Check this out.
- <http://www.fresno.edu/pacs/introadr.html>  
This is an introduction to the ADR program offered by the Center for Peacemaking and Conflict Studies at the University of California at Fresno. It includes a list of articles and books on the subject.

### Judicial ADR

The *Judges Journal* of the American Bar Association is planning to publish an article entitled "Increasing the Voluntary Use of Judicially-Assisted ADR," probably in its September issue.

The article, written by Reba Page and Wesley Jockisch, Administrative Law Judges on the U.S. Army Corps of Engineers' Board of Contract Appeals, discusses the broad array of disputes susceptible to judicial ADR; compares agency and judicial ADR; and describes a large tool kit of ADR techniques available to the judiciary that offer the parties the opportunity to resolve an appeal in a streamlined fashion, protect the rights of each party, minimize expense, and safeguard legal precedent. The article emphasizes the increased options available when using judges in an ADR process.

### Training

**Mediation Training in September:** As part of the Corps' on-going effort to integrate ADR skills into all of its business processes, the theme for the USACE semi-annual national Equal Employment Opportunity (EEO) conference will be mediation training. The USACE EEO Training Conference, to be held September 9-13, 1996 in Kansas City, MO, will orient EEO Officers to the principles and benefits of mediation for EEO complaints. Workshops and discussion panels will cover the ground rules for using mediation during pre-complaint stages of an EEO discrimination complaint, and ways to overcome barriers to mediation and settlements.

U.S. Army Corps of Engineers  
Institute for Water Resources  
7701 Telegraph Rd.  
Alexandria, VA 22315-3868

Published quarterly by the US Army Corps of Engineers. Submit articles to Donna Ayres at the above address or electronically to:

DONNA.AYRES@INET.HQ.USACE.ARMY.MIL

Phone: 703-428-6291; Fax: 703-428-8435